

**Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Frank Temmerman, Clerk**

Hearing Held: Friday, February 4, 2011, 9:00 a.m.

FOOTHILL CONSERVANCY, et al.	Case Number: 34-2010-80000491
v.	
EAST BAY MUNICIPAL UTILITY DISTRICT, et al.	

Proceedings: Petition for Writ of Mandate

**Filed By: Michael Graf and Thomas P. Infusino, Attorneys for
Petitioners**

On February 4, 2011, at 9:00 a.m., this matter came on for hearing with counsel present as indicated on the record. The matter was argued and submitted. Having taken the matter under submission, the Court now rules as follows:

RULING UNDER SUBMISSION

This proceeding involves a challenge under the California Environmental Quality Act ("CEQA") to Respondent East Bay Municipal District's approval and accompanying certification of a program-level environmental impact report ("EIR") for the update to its "Water Supply Management Program" plan. Petitioners Foothill Conservancy, Friends of the River, and the California Sportfishing Protection Alliance contend that the project approval and EIR certification should be set aside because the District failed to comply with the requirements of CEQA.

The gravamen of Petitioners' complaint is that the District failed to adequately analyze and mitigate the environmental impacts of its programmatic decision to expand the Pardee and Lower Bear Reservoirs.

The District contends that its Water Supply Plan is a policy-level document that examines the results of a planning exercise and does not commit to undertake any supplemental water supply projects, including the Pardee and Lower Bear Reservoir expansions. The District denies the Water Supply Plan is subject to

CEQA, but even if it is, the District contends it satisfied the requirements for a first-tier, program-level EIR.

For the reasons described below, the petition is granted in part and denied in part. The Court concludes the District's Water Supply Plan is a project subject to CEQA, but concludes the District's EIR was only required to include a broad, program-level discussion of the potential environmental impacts of the project. The Court agrees with Petitioners, however, that even at a broad, programmatic level, the EIR fails in a number of respects to adequately analyze the potential impacts of, and alternatives to, the proposed project

Background Facts and Procedure

The "project" at issue in this proceeding is the District's most recent update to its Water Supply Plan, entitled the *Water Supply Management Program 2040 Plan*. The primary purpose of the Water Supply Plan is to identify and recommend solutions to meet the District's dry-year water supply needs through the year 2040. The Plan estimates dry-year water supply needs to the year 2040, and proposes a program of policy initiatives and projects to meet those needs.

Because the District's existing supplies are insufficient in dry years, the Plan proposes and evaluates a range of "portfolios" to bridge the gap between supply and demand. Each portfolio consists of a series of actions that could be implemented over time to meet the need for water in the District's service area. In general, the portfolios include demand-side water management solutions -- i.e., conservation, water recycling, rationing measures -- and an assortment of potential supplemental water supply projects that could be pursued, as necessary, to meet future dry-year water needs. Thus, the "components" of the portfolios are water conservation, rationing, and recycling policy initiatives, and the proposed supplemental water supply projects. (4 AR 688-689, 1669-1672.)

Over 50 potential components were initially identified. The components were assembled into 14 distinct water supply portfolios. The portfolios were then evaluated based on their ability to meet the District's water supply planning objectives. (10 AR 4261-4265; 11 AR 4423-4425.) The evaluation process ultimately yielded six portfolios: one "Preferred Portfolio" and five alternative portfolios.

The Preferred Portfolio includes the following components: dry-year water rationing, conservation measures, recycled water programs, and various supplemental water supply projects. The supplemental water supply options in the Preferred Portfolio include, as part of the "Regional Upcountry Project," expanding Pardee Reservoir and Lower Bear Reservoir.

Expanding Pardee Reservoir would potentially raise the existing reservoir level by up to 33 feet, thereby increasing the maximum storage capacity of the

reservoir from 209,950 AF to 370,000 AF, and the total surface area of the reservoir from 2,200 acres to 3,480 acres. If implemented, the project would inundate up to two miles of the Mokelumne River.

Expanding Lower Bear Reservoir would raise the existing dam by 32 feet, thereby increasing the maximum storage capacity of the reservoir by about 18,300 AF.

The District prepared a program EIR (the "EIR") to evaluate, at a program level, the potential adverse environmental impacts of the Preferred Portfolio and its alternatives, and to identify feasible mitigation measures to reduce or eliminate the potentially significant impacts.

In July of 2008, the District issued its Notice of Intent to prepare the draft EIR. Public scoping hearings followed.

In February of 2009, the District released the draft EIR for public review and comment. In regard to impacts unique to the Pardee and Lower Bear Reservoir expansions, the draft EIR found potentially significant and unavoidable impacts to air quality (Impacts 5.2.F-2, F-3, and F-4), noise (Impacts 5.2.G-1, G-2, and G-4), and visual resources (Impact 5.2.I-1). (2 AR 504-515, 560-564.)

The draft EIR also found that the Pardee and Lower Bear expansions would, with mitigation, have less-than-significant impacts on hydrology, groundwater and water quality; geology, soils and seismicity; biological resources; land use and recreation; transportation; cultural resources; hazards; public services, utilities and energy; and environmental justice. According to the draft EIR, the potentially significant impacts that could be mitigated to a level of insignificance include, among other things: potential changes in Mokelumne River basin hydrologic conditions from enlarged reservoirs; potential exposure of people or structures to geologic or seismic hazards, potential impacts to sensitive natural communities or wetlands; potential disturbance or loss of special-status plants, trees, invertebrates, reptiles, amphibians, mammals, nesting birds, fish, and habitats; disruption of downstream flow releases; potential impairment of recreation facilities and activities; potential alterations or damage to cultural resources; and potential exposure to risk of wildland fires. (2 AR 515-548)

Petitioners and other members of the public submitted comments objecting to the Pardee and Lower Bear Reservoir expansion projects and the District's environmental review of those projects. The District held public meetings and workshops to discuss the comments received on the draft EIR, evaluate the issues, and allow additional public input.

On October 1, 2009, the District released its final EIR for the Water Supply Plan. The final EIR included several revisions to the draft EIR (10 AR 4233-4250.)

On October 13, 2009, the District Board certified the final EIR and approved the Water Supply Plan, with the following three changes: (1) the District included a definition of "upcountry stakeholders;" (2) the District agreed to work with upcountry stakeholders to achieve a Wild and Scenic River designation for the Mokelumne River; and (3) the District agreed to eliminate consideration of Pardee Reservoir configurations with a spillway elevation above 600 feet ¹ (2 AR 484-487; 2 AR 491-566.)

Further, in response to comments, the District placed limits on its authority to proceed with the Enlarge Pardee Reservoir project. Specifically, the District's Board committed to prepare project-level CEQA documentation before proceeding with the Enlarge Pardee Reservoir project. The Board further committed that it would not proceed with project-level CEQA documentation for the Enlarge Pardee Reservoir project until after the following three conditions are satisfied:

1. The District has worked as part of a regional partnership to conceptually develop and study the feasibility of a Regional Upcountry Project or an Integrated Regional Conjunctive Use Project, and, as part of such studies, has considered multiple elevation and capacity configurations for an enlarged Pardee Reservoir project at or below a spillway elevation of 600 feet;
2. The Regional Upcountry Project or Integrated Regional Conjunctive Use Project is determined to provide regional benefits and is supported by "upcountry stakeholders;" and
3. The Board confirms that additional water is needed based on the status of customer demand, progress toward completion of the conservation, recycling, and supplemental water supply elements identified in the Water Supply Plan, and consideration of the degree to which customer rationing has been achieved and the quantity of water available from the Mokelumne River during the drought planning sequence. (2 AR 475-476, 485-487.)

The District filed its Notice of Determination for the project on October 20, 2009.

On November 19, 2009, Petitioners filed the instant petition for writ of mandate challenging the District's approval of the Water Supply Plan and certification of the EIR for failure to comply with the requirements of CEQA. Petitioners seek a peremptory writ of mandate ordering the District to set aside its approval of the Water Supply Plan and certification of the EIR,

Standard of Review

In a mandate proceeding to review an agency's decision for compliance with CEQA, the court reviews the administrative record to determine whether the

¹ The District Board further amended its approval on October 27, 2009, to increase to 15% the amount of rationing under the Preferred Portfolio (2 AR 475-476)

agency abused its discretion (Pub. Res. Code §§ 21168, 21168.5.) Abuse of discretion is shown if the agency has not proceeded in the manner required by law, or the determination is not supported by substantial evidence. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106.) Judicial review differs significantly depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Ebbets Pass Forest Watch v. California Dept. of Forestry & Fire Prot.* (2008) 43 Cal.4th 936, 944, 949.)

On review of whether an agency has failed to proceed in the manner required by law, the court evaluates de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.) An agency may fail to proceed in the manner required by law if its analysis is based on an erroneous interpretation of CEQA's requirements, or if it has failed to comply with the standards in CEQA for an adequate EIR.

The EIR has been described as the "heart of CEQA." (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 368.) It is an "environmental alarm bell" which has the objective of providing governmental officials and the public with detailed information about the effect which a proposed project is likely to have on the environment before the decision is made. (*Ibid.*) Thus, the failure to include adequate information in an EIR may constitute a failure to proceed in the manner required by law.

However, when reviewing the adequacy of an EIR, courts do not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informational document. (*Laurel Heights Improvement Ass'n v. Regents of University of California* ["*Laurel Heights I*"] (1988) 47 Cal.3d 376, 392.) The sufficiency of an EIR is determined according to what is reasonably feasible. (Cal. Code Regs., tit. 14, § 15151; *Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.368.) Courts do not look for technical perfection, but for "adequacy, completeness, and a good faith effort at full disclosure." (Cal. Code Regs., tit.14, § 15151; *Sequoiah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 712; *Association of Irrigated Residents v. County of Madera* (2004) 107 Cal.App.4th 1383, 1390-1391.)

The absence of information in an EIR is not *per se* a prejudicial abuse of discretion. (*Al Larson Boat Shop, Inc. v. Bd. of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748; *Association of Irrigated Residents, supra*, 107 Cal.App.4th at p.1391.) A prejudicial abuse of discretion occurs only if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.² (*Al*

² But a failure to disclose information necessary to informed decisionmaking and informed public participation constitutes a prejudicial abuse of discretion regardless whether a different outcome would have resulted if the agency had complied with the disclosure requirements (Pub. Res

Larson Boat Shop, supra, 18 Cal.App.4th at p.748; see also *Association of Irrigated Residents, supra*, 107 Cal.App.4th at p 1390 [EIR must provide detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project]; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 594 [EIR must provide agencies with sufficient information to enable them to make a decision that intelligently takes account of the environmental consequences of the proposed project].)

While questions of interpretation or application of the requirements of CEQA are reviewed *de novo*, reviewing courts accord greater deference to the agency's substantive factual conclusions. (*Save Tara, supra*, 45 Cal.4th at p.131.) An agency's factual determinations are reviewed under the substantial evidence standard. (*Laurel Heights I, supra*, 47 Cal.3d at p.393.)

Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal Code Regs., tit.14, § 15384.) Substantial evidence includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts, but does not include argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment " (*Ibid.*)

In applying the substantial evidence standard, the court does not determine whether the agency's factual determinations were correct, but only whether they were supported by substantial evidence. (*Laurel Heights I, supra*, at p 393, *Association of Irrigated Residents, supra*, 107 Cal.App.4th at p.1391.) The court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (*Laurel Heights I, supra*, 47 Cal 3d at p.393.) The court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. (*Ibid.*)

Regardless of what is alleged, an EIR approved by a governmental agency is presumed legally adequate, and the party challenging the EIR has the burden of showing otherwise. (*Santa Clara Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158, *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.)

Code § 21005, *Bakersfield Citizens for Local Control v City of Bakersfield* (2004) 124 Cal App 4th 1184, 1198, *Association of Irrigated Residents, supra*, 107 Cal App 4th at p 1392)

Discussion

Petitioners filed the instant petition for writ of mandate challenging the District's approval of the Water Supply Plan and certification of the EIR. Petitioners allege that the District violated CEQA by failing to adequately identify and mitigate the significant impacts of the proposed reservoir expansions on recreational, historical, public safety, biological, and cultural resources in the Mokelumne River and Delta.

In particular, Petitioners allege that the EIR fails to identify potentially significant impacts that expansion of the Pardee Reservoir will have due to inundation of approximately 2 miles of the Mokelumne River, including: (i) the loss of the Middle Bar (whitewater) Run and part of the Electra Run, (ii) loss of instream, riparian, and upland habitat; (iii) loss of native Miwok ancestral gathering places; (iv) loss of the Middle Bar Bridge, a historic resource and important emergency evacuation route; (v) loss of a Bureau of Land Management (BLM) planned recreational facility; and (vi) inability to have this stretch of the Mokelumne River designated a "wild and scenic river" by BLM. In addition, Petitioners allege the EIR fails to identify potentially significant impacts that expansion of the Pardee Reservoir may have on the downstream habitat of the Delta.

Petitioners allege that the EIR also fails to identify potentially significant impacts from the proposed expansion of the Lower Bear Reservoir, including the growth-inducing impacts of the additional water supply, the elimination of existing recreational facilities, and the biological impacts from increasing cold water flows during the summer months.

In addition to the EIR's failure to adequately describe these impacts, Petitioners contend the EIR fails to include adequate mitigation measures to reduce them to insignificance. Instead, the EIR defers the formulation and implementation of mitigation measures unless and until the District conducts project-level environmental review for the reservoir expansion projects. As a result, Petitioners argue, the District's determination that impacts will be mitigated to a less-than-significant level is not supported by substantial evidence.

Further, Petitioners contend that the EIR's flawed findings on impacts and mitigation skewed the EIR's alternatives analysis, preventing consideration of reasonable alternatives that feasibly could avoid or reduce the project's significant adverse environmental effects.

Finally, Petitioners contend that the District violated CEQA by failing to respond adequately to comments on the EIR.

The District responds that all of Petitioners' CEQA claims should be dismissed because the District's Water Supply Plan is a mere planning or feasibility study, exempt from the requirements of CEQA.

Further, even if the District was required to prepare an EIR before adopting the Water Supply Plan, the District contends that its EIR is consistent with the requirements of CEQA. The District accuses Petitioners of seeking to require the detailed level of analysis that is required for a project-level EIR, even though the Water Supply Plan is a general, program-level document. The District maintains that the level of detail Petitioners seek is not required, advisable, or even possible.

Instead of speculating about the specific impacts of optional projects, the District contends it properly provided a generalized discussion of the possible impacts of the Water Supply Plan as a whole. The District asserts that the EIR adequately evaluated and appropriately mitigated all of the potentially significant environmental effects of the Water Supply Plan at a program level. Further, it evaluated a reasonable range of alternative portfolios and adequately justified the decision to exclude the Los Vaqueros Reservoir and to reject the Buckhorn Reservoir projects. Moreover, it adequately responded to public comments.³ Accordingly, the District maintains that the EIR satisfies the CEQA requirements for a program-level EIR.

Finally, even if the EIR is deficient, the District contends there is no prejudicial abuse of discretion because the District has committed it will not "tier" off the program-level EIR as a means of avoiding a full project-level analysis of the Enlarge Pardee Reservoir project. Instead, if that project is ever developed, the District insists it will prepare a project-level EIR to fully analyze and mitigate all of the project's significant impacts.

The Court separately addresses each of these claims below.

A. Is the District's Plan exempt from CEQA review?

As an initial matter, Respondent District contends that all of the challenges to its EIR should be dismissed because the Water Supply Plan is not a project subject to CEQA.

To determine whether the District was required to prepare an EIR for the Water Supply Plan, the Court turns first to the text of CEQA and the CEQA Guidelines. CEQA provides that a public agency must prepare an EIR for any discretionary "project" it proposes to carry out or "approve" that may have a significant effect on the environment (Pub. Resources Code §§ 21080, 21100(a), 21151(a))

A "project" is defined as an activity undertaken by a public agency, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (Pub.

³ In any event, the District argues Petitioners waived this argument by failing to identify a single deficient response

Resources Code § 21065(a).) The term "project" refers to the whole of an action which is being approved, and which may be subject to several discretionary approvals by governmental agencies (14 C.C.R. ["Guidelines"] § 15378.) The term "project" does not mean each separate governmental approval. (*Ibid.*)

"Approval" means "the decision by a public agency which commits the agency to a definite course of action in regard to a project . . ." (Guidelines § 15352(a).) Approval cannot be equated with mere interest in, or inclination to support, a project, no matter how well defined. (*Save Tara, supra*, 45 Cal 4th at p.136) Instead, courts look to determine whether, as a practical matter, the agency has taken action that furthers a project in a manner that effectively precludes alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. (*Id* at pp.138-139) CEQA does not apply to projects which a public agency rejects or disapproves. (Pub. Resources Code § 21080(b)(5).) But if, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has "approved" the project. (*Id.* at p.139.)

In this case, the District admits it approved the Water Supply Plan, but the District contends the Plan is not a "project." Because the Water Supply Plan does not commit the District to undertake any particular supplemental water supply project, the District argues that the Plan is merely a planning or feasibility study, exempt from the requirements of CEQA.

The flaw in District's argument is that it takes an overly narrow view of the Water Supply Plan. First, by focusing only on the potential supplemental water supply projects, the District ignores the Water Supply Plan's fundamental policy initiatives.

The purpose of the Water Supply Plan is to identify and recommend solutions to meet the District's future dry-year water supply needs. In so doing, the Water Supply Plan incorporates a fundamental policy decision about how the District will proceed to provide water to its customers in the future. As described in the Plan and the EIR, one of the purposes of the Water Supply Plan is to establish conservation, water recycling, and rationing initiatives to reduce water demand. (See, e.g., 10 AR 4257, 4267-4268, 4271.) Since there is a projected gap between supply and demand, these demand-side water management solutions are directly related to the District's need for additional water supply projects: the more demand is reduced, the less additional water supplies will be required to meet future water needs.

By adopting the Water Supply Plan, the District committed itself to particular rationing, conservation, and recycling levels. This, in turn, committed the District to a specific programmatic direction that will require the District to pursue various supplemental water supply projects to bridge the gap between supply and

demand. (2 AR 604 ["During droughts a combination of rationing and additional supplemental water sources will be needed"]; 2 AR 667 ["Supplemental water sources, beyond those already planned or constructed under EBMUD's 1993 WSMP must be developed to ensure reliability during a multiple-year drought event"]; 4 AR 1672 ["Additional supplemental water supplies will be needed . . ."]; see also 4 AR 691; 10 AR 4266.)

In this sense, the Plan charts the District's direction for meeting future water needs and guides the District's decisions concerning future supplemental water supply projects. (See 10 AR 1674.)

Second, while the District may not have "approved" any particular water supply project, the District has approved a "preferred portfolio" of supplemental water supply options. The very purpose of the Water Supply Plan was to identify and "recommend" solutions to ensure that projected increases in water demand can be met in dry years. (2 AR 601.) As a result, the Water Supply Plan includes "proposed supplemental supply projects." (4 AR 1672)

In order to provide flexibility and ensure that the objectives of WSMP 2040 are achieved, the "preferred portfolio" includes multiple supplemental water supply components. (2 AR 476.) It is possible that some of the "preferred" supplemental water supply components may not be constructed. (4 AR 1672.⁴) However, because the EIR concedes that "additional supplemental water supplies will be needed," it is reasonably foreseeable that some of the "preferred" supplemental supply components will be constructed (10 AR 4266.)

The District may not have committed itself to implement any *particular* supplemental supply component, but it has made a choice to implement one (or more) of the "preferred" supplemental supply options. Therefore, it has taken an "essential step" to implement a project that effectively precludes alternatives and mitigation measures that CEQA would otherwise require to be considered -- e.g., a "no project" alternative pursuant to which the District would not pursue any additional water supplies to meet future dry-year water needs. (See 2 AR 555; see also 2 AR 747-749.)

To ensure reliability of water supply during a multiple-year drought event, the District's Plan proposes to develop one or more of the supplemental supply components. That itself is a "definite course of action" leading to an environmental impact and requiring environmental review. (See Guidelines § 15352(a); *Save Tara, supra*, 45 Cal 4th at pp.138-139.)

⁴ "All of the supplemental supply components are included in the Preferred Portfolio, however, only those components that are most feasible according to the circumstances that arise during the 2010-2040 planning period would be implemented " (4 AR 693, see also 4 AR 1680)

Therefore, the Court concludes that the Water Supply Plan is a "project" for purposes of CEQA, and the District was required to prepare an EIR evaluating the environmental impacts of the Plan.

B. Was the District required to conduct a comprehensive, detailed analysis of the supplemental water supply components?

Even if an EIR was required for the Water Supply Plan, the District contends it was not required to conduct a detailed environmental analysis of the supplemental water supply components. Because the Water Supply Plan is a policy-level document and does not commit the District to any particular water supply component, the District contends the EIR was not required to analyze the site-specific impacts of the preferred supplemental water supply components. According to the District, the EIR at most was required to include a broad, policy-level discussion of the potential environmental impacts of supplying additional sources of water. To the extent its EIR includes detailed analysis of the preferred water supply options, the District asserts it has exceeded the requirements of CEQA, and should not be penalized for doing so

Petitioners argue that because the District included specific supplemental water supply components in its Water Supply Plan and EIR, the District was obligated to go "all the way," and provide a comprehensive, site-specific analysis of those components

The Court finds neither party is entirely correct and that the level of detail required in the District's EIR lies between the two extremes urged by the parties. Nevertheless, the Court ultimately agrees with the District that because the Water Supply Plan does not commit the District to undertake any particular water supply component, the EIR was not required to analyze the site-specific impacts of the preferred supplemental water supply components

Since it is undisputed the District intended its EIR to be a first-tier, "program-level EIR," the Court begins its analysis with a discussion of "program EIRs" and the related concept of tiering.

Under CEQA, a "program EIR" is a specific type of EIR. It is used to review in one document a series of related actions that can be characterized as "one large project"⁵ (Guidelines, § 15168.) The use of a program EIR allows a lead agency to focus its analysis on the broad, long-term cumulative impacts of a planning-level or policy action. Further, by "tiering," the program EIR may allow

⁵ As provided in the CEQA Guidelines, a program EIR is an optional procedure to review in one document "a series of actions that can be characterized as one large project" and that can be related either (1) geographically, (2) as logical parts in the chain of contemplated actions, (3) in connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) as individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways (Guidelines, § 15168)

the agency to dispense with environmental review for later activities within the program that were adequately covered in the program EIR. (Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999) p.518.)

"Tiering" refers to the coverage of general matters in broader EIRs with subsequent narrower or site-specific CEQA review incorporating by reference the general discussions from the broader EIR and concentrating the later EIR or negative declaration solely on the issues specific to the later project. (Guidelines §§ 15152, 15385.) Tiering is a process by which agencies can adopt programs, plans, or policies with an EIR focusing on the "big picture," followed by narrower or site-specific environmental review focusing on the specific impacts of the later projects. (*Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36.)

By "tiering" from a first-tier, program EIR, the agency may be able to carry out an entire "program" without having to prepare any additional, site-specific EIRs or negative declarations.⁶ (Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999) p.518.) Thus, if a program EIR is sufficiently comprehensive and detailed, a program EIR can serve two important functions (1) as a "first-tier" EIR for a program-level decision, allowing the agency to focus on broad policy alternatives, generalized mitigation measures, and other factors that apply to the program as a whole; and (2) as a site-specific EIR, allowing an agency to dispense with further environmental review for later activities within the program that were adequately covered in the previous EIR.

Of course, where a lead agency intends to rely on an initial EIR to carry out an entire "program" without having to prepare any additional environmental review, the initial EIR must be very detailed. If the future activity is not adequately considered in the initial EIR, it will have to be discussed in a subsequent EIR or negative declaration before it is approved under CEQA.

Tiering *may* enable a public agency to avoid having to undertake a repetitious analysis of significant environmental effects previously addressed in an earlier EIR. Tiering is *not* a device for deferring analysis of the significant environmental impacts of a proposed project. Every EIR, including a first-tier EIR, must describe the project being reviewed and discuss the potentially significant environmental effects if the project is approved. (Guidelines § 15124.) A decision to tier does *not* excuse a governmental entity from preparing an EIR that adequately analyzes the project actually being approved. (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal App.4th 182, 197; Guidelines § 15152(b).)

However, the level of specificity required in an EIR is determined by the nature of the project being reviewed. (*Al Larson Boat Shop, Inc. v. Bd. of Harbor*

⁶ Conversely, if a later project is not adequately considered in the program EIR, the activity will have to be analyzed in a subsequent EIR or negative declaration before it can be approved under CEQA. (*Rio Vista Farm Bureau, supra*, 5 Cal App 4th at p 372.)

Commissioners (1993) 18 Cal.App.4th 729, 741-742, 746 [the degree of specificity required in an EIR corresponds to the degree of specificity involved in the proposed project]; *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 374 [same]) The level of detail required in an EIR need not be greater than that of the proposed project. (Guidelines § 15152(b).)

Where the proposed project is a large-scale, planning-level decision, an EIR may contain only generalized mitigation criteria and policy-level alternatives, and defer for future study the formulation of details regarding later, site-specific projects. (*Koster, supra*, 47 Cal.App.4th at p.37.) The initial EIR then may be followed by "tiered" environmental analysis focusing on the specific impacts of later projects that implement the program, policy, or plan.⁷ Subsequent EIRs or negative declarations need not examine environmental effects that the agency finds were mitigated or avoided as a result of the prior project approval or that were reviewed in sufficient detail in the previous EIR to allow those effects to be mitigated when the later project is approved.

The purpose of an EIR is to provide public agencies and the public with detailed information about the significant effects a project is likely to have on the environment, to list ways those effects might be minimized or avoided, and to identify alternatives to the project. (Pub. Resources Code §§ 21061, 21100.) An agency faced with a project with significant environmental effects has a duty under CEQA to avoid or minimize environmental damages whenever feasible before approving the project. Thus, an EIR's analysis must be sufficiently detailed to enable lead agencies to make a decision that intelligently takes account of the environmental impacts that are likely to occur.⁸ (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712)

However, CEQA only requires an EIR to discuss the significant environmental effects of the project being reviewed for approval, not some hypothetical project. (*Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 373.)

It follows that an accurate description of the project is necessary to decide what kind of EIR is required. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.) Only through an accurate view of the project may official decisionmakers and the public balance the project's benefit against its environmental cost, consider mitigation measures, and weigh other alternatives.

⁷ Conversely, where a lead agency intends to rely on its initial EIR to carry out an entire "program," without having to prepare any additional site-specific EIRs or negative declarations, the first-tier EIR must be very detailed, it must include sufficient detail to allow the agency to anticipate the specific effects of later projects within the scope of the program and mitigate those effects when the later projects are approved. CEQA Guideline section 15152 provides detailed guidance for determining whether a site-specific project's environmental effects were adequately addressed in a first-tier EIR.

⁸ The EIR need not discuss impacts that are clearly insignificant or unlikely to occur (Guidelines § 15143)

(*Id.* at p.193 [an accurate, stable and finite description of the project is "the *sine qua non* of an informative and legally sufficient EIR."].)

CEQA defines a "project" as "an activity, which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment." (Pub. Resources Code § 21065; Guidelines § 15378.) The term is broadly construed to maximize protection of the environment. Under CEQA, an EIR's project description must describe the "whole of the action" which is being approved, including all components and future activities that are reasonably anticipated to become part of the project. (Guidelines § 15378; *Laurel Heights Improvement Assn. v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 396; see also *Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.370 [the requirements of CEQA cannot be avoided by chopping a large project into many little ones or by excluding reasonably foreseeable future activities that may become part of the project].)

In contrast, future activities which are not currently proposed for approval, and not a reasonably foreseeable consequence of the project, need not be included in the EIR's description of the project. (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1453; *Laurel Heights Improvement, supra*, 47 Cal.3d at p.396; *Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.373) "Where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." (*City of Santee, supra*, 214 Cal.App.3d at p.1453; see also *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 [CEQA applies to project components that an agency is proposing to implement, not to preliminary plans, feasibility studies or contemplated development the agency is not proposing to approve or undertake], *National Parks and Conservation Association v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1520 [deferral of environmental review does not violate CEQA where an EIR cannot currently provide meaningful information about speculative future projects].)

In this case, the parties agree that the Water Supply Plan is the "project," but disagree as to whether the "Regional Upcountry" components are within the scope of that project. The Court concludes that they are.

The question is not, as the District maintains, whether the District has committed to implement all of the components of the Preferred Portfolio. (See 4 AR 1674.) The question is whether the decision has committed the District to a definite course of action in regard to future supplemental water supply projects. This question must be answered in the affirmative.

As described above, by adopting the Water Supply Plan, the District committed to a specific programmatic direction that will require the District to pursue various

supplemental water supply projects to bridge the gap between supply and demand.

Had the Water Supply Plan stopped here, the District's EIR would not have been required to describe specific supplemental water supply projects or to address the site-specific impacts of those projects. It would have been sufficient for the District to include a broad, policy-level discussion of the secondary effects of supplemental water supply projects generally

But this is not what happened. Instead, the District considered a range of specific supplemental water supply components, rejected the components that did not meet the District's objectives, and selected a "preferred portfolio" of supplemental water supply solutions to be included as part of the District's Water Supply Plan.

In determining whether an agency has "approved" a project, courts look to determine whether, as a practical matter, the agency has taken action that furthers the project in a manner that effectively precludes alternatives or mitigation measures that CEQA would otherwise require to be considered (*Save Tara, supra*, 45 Cal.4th at pp.138-139.) If, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then the agency has "approved" the project. (*Id.* at p.139.)

Here, the District has made a choice to advance its "preferred" water supply options, and this choice, as a practical matter, is likely to preclude alternatives that CEQA otherwise would require to be considered. Thus, the Court finds the District was required to evaluate the "preferred" water supply components in its EIR.

The situation here is similar to *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29. At issue in *Koster* was a Board of Supervisor's decision to permit the inclusion of two new communities in a long-range general plan amendment. The trial court rejected a challenge to the Board's decision as premature, reasoning that the general plan did not approve construction of the communities and the mere act of placing the towns on a map for possible future development is not by itself, an environmental impact. The trial court concluded that the petitioners should challenge the environmental impacts of the communities when concrete plans are submitted by the developers (*Id.* at pp.31-35.)

The Third Appellate District Court of Appeal reversed with directions to the trial court to consider petitioners' challenges on the merits. Although acknowledging the Board had not fully committed to implement the new towns, the Court found that the Board had made a fundamental policy decision about where future growth "ought to occur" within San Joaquin County. (*Id.* at p.41.) By placing these towns on the general plan map, "[t]he Board did not merely find that two

new towns of a certain approximate size should be considered somewhere in the southern part of San Joaquin County," it made a "choice" about site selection. (*Id.* at p.42.)

Likewise, here the District did not merely determine that some, undecided supplemental water supplies would be needed at some undetermined locations, it selected a specific portfolio of "preferred" supplemental water supply options to be implemented as part of the District's Water Supply Plan.

The District's reliance on *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, is misplaced. The facts of those cases are different.

Rio Vista Farm Bureau involved the validity of an EIR for a county's hazardous waste management plan. The plan did not select any specific sites for hazardous waste disposal facilities, or even determine that future facilities will be necessary, but instead merely designated certain areas within the county in which future facilities permissibly could be located. (*Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at pp.373-374)

Al Larson Boat Shop is similar. At issue in that case was a proposed five-year plan to increase port cargo handling capacity. Although the plan and EIR described six "anticipated" port projects, the Court found that the EIR described the projects *solely for the purposes of giving a reasonably detailed consideration to the overall plan*. The Court found the Board did not intend the plan and EIR to be a material step in officially selecting or approving any of the "anticipated" projects. (*Al Larson Boat Shop, supra*, 18 Cal App 4th at pp.742-743; see also *In re Bay-Delta Programmatic Environmental Impact Report ("In re Bay-Delta EIR")* (2008) 43 Cal.4th 1143, 1168 n 8 [noting EIR for CALFED identified specific, "representative" projects for achieving the goal of water storage])

The same cannot be said here. The District did not merely designate certain areas where supplemental water supply projects would be appropriate, or describe "representative" supply projects for purposes of giving detail to the Water Supply Plan. Rather, the District selected a portfolio of specific solutions to meet the District's need for supplemental water supplies.

The "Regional Upcountry" components are within the scope of the Water Supply Plan project and the District was required to evaluate them. Under the circumstances, it would not have been sufficient for the EIR to describe, in general terms, the secondary effects of unspecified supplemental water supply projects.

Still, the level of detail required in the EIR need not be greater than that of the proposed project. CEQA recognizes that the impacts of policy-level decisions

cannot be predicted or examined with the same exactitude and detail required for a construction project. (*Koster, supra*, 47 Cal.App.4th at p.41.) The difficulty of assessing future impacts at the policy-level does not excuse preparation of an EIR, but it reduces the level of specificity required. (*Ibid*) Thus, a program-level EIR need not be as precise as a project-specific EIR. (*Ibid.*; *Al Larson Boat Shop, supra*, 18 Cal.App.4th at p.746 [EIR on the adoption of a general plan must focus on the secondary effects of adoption, but need not be as precise as an EIR on the specific projects which might follow].)

The sufficiency of an EIR is to be reviewed in light of what is reasonably feasible. (Guidelines § 15151.) Where development of detailed, site-specific information is not feasible in a first-tier EIR, it is proper for a lead agency to focus the first-tier EIR on the general plan or program and defer site-specific analysis to the future when specific projects are being considered. (*In re Bay-Delta EIR, supra*, 43 Cal.4th at pp.1174-1175; see also *Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p 373 [where EIR cannot provide meaningful information about a future project, deferral of environmental assessment does not violate CEQA]; *Al Larson Boat Shop, supra*, 18 Cal.App.4th at p.746 [while an EIR cannot defer all consideration of cumulative impacts to a later time, it may legitimately indicate that more detailed information may be considered in future project EIRs].)

Here, because the Water Supply Plan is a policy-level document and does not commit the District to any particular water supply component, the District contends it was not required by CEQA to conduct a full-scale, detailed environmental analysis of the Regional Upcountry components. According to the District, the EIR at most was required to include a broad, policy-level discussion of the potential environmental impacts of supplying additional sources of water. The District asserts that environmental documentation should be prepared to evaluate the site-specific impacts of the portfolio components as they are developed. There is merit to the District's arguments.

The Water Supply Plan at issue here is not a "project" to enlarge the Pardee and Lower Bear Reservoirs or undertake any particular supplemental water supply project. The Plan suggests that supplemental water supply projects will be necessary, and even selects "preferred" water supply options, but the Water Supply Plan does not commit the District to implement all of the preferred portfolio components, or any particular water supply project. Thus, although supplemental water supply options have been identified, it is unknown which of the potential water supply projects will actually be developed.

The District is not required to undertake a full-scale, detailed environmental analysis of the preferred portfolio components merely because the EIR may be used to focus or simplify later review in a tiered EIR.⁹ In reviewing the sufficiency

⁹ Citing to its Findings, the District claims that it does not intend to tier from its program EIR. (2 AR 486.) The cited portions of the Findings do not support this claim. The Findings show the District has committed to prepare a project-level EIR for future, project-level activities, but the

of the EIR, the question is whether the EIR includes enough information for decisionmakers to intelligently consider the environmental consequences of the project. The Court is not aware of any authority finding an EIR deficient for including too much information. Such a finding would be contrary to the purposes of CEQA. Lead agencies should not be faulted for providing decisionmakers and the public with as much information as possible about the project and its environmental impacts.

Of course, if a future project is not fully analyzed in a first-tier EIR, it will have to be discussed in a subsequent EIR or negative declaration before it can be approved under CEQA. (*Laurel Heights Improvement Assn.*, *supra*, 47 Cal.3d at p.396.) Later, project-level environmental review will require an independent determination and disclosure of site-specific environmental impacts. (*In re Bay-Delta EIR*, *supra*, 43 Cal.4th at p.1176.)

Yet in light of the broad, programmatic nature of the District's Water Supply Plan, and the flexible and uncertain nature of the supplemental water supply components, the Court finds the District was not required to conduct comprehensive, site-specific analysis of the individual water supply components in its program-level EIR. The District merely was required to include a general discussion of the potential environmental impacts of the preferred supplemental water supply components.

Against this background, the Court turns to Petitioners' specific challenges to the EIR, to decide whether the District's EIR included sufficient detail to enable those who did not participate in its preparation to understand and meaningfully consider the environmental consequences of the Water Supply Plan. (See *Rio Vista Farm Bureau*, *supra*, 5 Cal.App.4th at p.375; *In re Bay-Delta EIR*, *supra*, 43 Cal.4th at p.1175.)

C. Did the District violate CEQA by failing adequately to identify or mitigate the significant impacts of the Enlarge Pardee Reservoir and Enlarge Lower Bear Reservoir components of the project?

Petitioners allege that the District violated CEQA by failing to adequately identify and mitigate the potentially significant environmental impacts of proposals to expand the Pardee Reservoir and Lower Bear Reservoir. The Court considers each component separately

1. The Enlarge Pardee Reservoir component

District did not pledge that it would not seek to tier from its program EIR. And even if it had, the enforceability of such a pledge would be questionable. Nevertheless, the Court will take the District at its word that it will not tier from the program EIR, at least in regard to future supplemental water supply projects. Indeed, this result appears to be compelled under CEQA.

Petitioners allege that the EIR does not adequately identify the potentially significant environmental effects that an expanded Pardee Reservoir would have on recreational, historical, biological, cultural, and public safety resources in the upper Mokelumne River and Delta. Petitioners allege the EIR fails to identify potentially significant impacts that expansion of the Pardee Reservoir will have due to inundation of approximately two miles of the Mokelumne River, including: (i) the loss of the Middle Bar (whitewater) Run, part of the Electra Run, and other recreational facilities; (ii) loss of instream, riparian, and upland habitat; (iii) loss of native Miwok ancestral gathering places; (iv) loss of the Middle Bar Bridge, a historic resource and important emergency evacuation route; and (v) inability to have this stretch of the Mokelumne River designated a "wild and scenic river" by BLM. In addition, Petitioners allege the EIR fails to identify potentially significant impacts that expansion of the Pardee Reservoir may have on the downstream habitat of the Delta.

Petitioners further allege that the EIR fails to include adequate mitigation measures to reduce these impacts to a level of insignificance. As a result, Petitioners argue, the District's determination that impacts will be mitigated to a less-than-significant level is not supported by substantial evidence.

a. Recreational and Cultural Resources: Potential loss of Middle Bar Run and native Miwok ancestral gathering places

Petitioners contend the District's EIR is deficient because it fails to identify the Middle Bar Run as a recreational resource, and fails to describe the potentially significant impact on recreation that would result if this section of the river is inundated by expansion of the Pardee Reservoir. The Court agrees.

The District argues that because the specific configuration (elevation) for an expanded Pardee Reservoir has not been determined, a detailed evaluation of how the Enlarge Pardee Reservoir component would impact the Middle Bar Run would be speculative. However, the problem with the District's EIR is not that it fails to include a detailed description of how the Middle Bar Run would be impacted under different configurations. The problem is that the EIR does not acknowledge the Middle Bar Run even exists.

There can be no dispute that if the Pardee Reservoir component is implemented, no matter which configuration (elevation) is chosen, some portion of the Middle Bar Run will be inundated. (See 10 AR 4237; 18 AR 7358.) The Middle Bar Run is a significant recreational resource, and inundation would eliminate this recreational resource. Thus, approval of the project may have a potentially significant environmental impact on recreational resources due to inundation of the Middle Bar Run. The EIR is inadequate from an informational standpoint because it fails to acknowledge this potentially significant impact.

Moreover, because the EIR fails to identify this potentially significant impact on recreational resources, the EIR's proposed mitigation measures are inadequate. The District found that potential impacts on existing recreational facilities could be mitigated to less than significance by operating the reservoir to preserve the "Electra Whitewater Run." (2 AR 534.) The Electra Whitewater Run is upstream of the Middle Bar Run, so committing to preserve the Electra Whitewater Run does not mitigate the potentially significant impacts to the Middle Bar Run. Thus, the District's finding that impairment of recreational facilities and activities will be "less than significant after mitigation" is not supported by substantial evidence.

Although the District was not necessarily required to formulate specific mitigation measures for the impact to the Middle Bar Run as part of its program EIR,¹⁰ the District was required to identify inundation of the Middle Bar Run as a potentially significant environmental impact of the project.

Petitioners further contend the District's EIR is deficient because it fails to adequately identify and mitigate the potentially significant impacts to native Miwok cultural gathering places. Petitioners argue that inundation of the Middle Bar area, an inevitable result of the Pardee Reservoir expansion, will eliminate these cultural sites. (The District's brief does not address this issue at all, except in its introduction)

The EIR acknowledges that the Miwok have a Black Willow gathering site in the Middle Bar area, but the EIR does not appear to include any proposed mitigation measures for the potential inundation of the site. Nevertheless, the District found that implementation of Mitigation Measures 5.2.H-1a, 5.2.H-1b, 5.2.H-1c, and 5.2.H-1d would reduce the potentially significant impacts from alteration or damage to known or unrecorded cultural resources to a less than significant level.

While deferring formulation of specific mitigation measures would be appropriate, the Court finds that the District has deferred formulating any mitigation measures for this impact, while nevertheless finding that its mitigation measures will reduce this potential impact to a less than significant level. This violates CEQA. The District has failed to adequately describe and mitigate the potentially significant impact to native Miwok ancestral gathering places.

¹⁰ *Gray v. County of Madera* (2008) 167 Cal App 4th 1099, 1118, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal App 4th 777, 793, *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal App 4th 351, 377, see also *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal App 4th 70, 92 [reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking], *City of Long Beach v. Los Angeles Unified School Dist* (2009) 176 Cal App 4th 889, 916 [impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR], *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal App 4th 645, 671 [deferral improper where no reason or basis is provided in the EIR for the deferral to a future management plan]

In contrast, the Court finds the EIR adequately identifies and analyzes the potentially significant recreational impacts due to possible inundation of the Electra Run, and adequately mitigates these impacts by committing to implement an operations plan that "preserves the Electra whitewater run." (2 AR 534.)

b. Historical and Public Safety Resources: Potential loss of Middle Bar Bridge

Petitioners also contend the District's EIR is deficient because it fails to adequately identify and mitigate the potentially significant impacts due to possible elimination of the Middle Bar Bridge, and the emergency evacuation option it represents.

The EIR identifies Middle Bar Bridge as a historical resource. The EIR finds that expanding the Pardee Reservoir could have potentially significant impacts on historical resources since raising the reservoir could require removal of the bridge, but the District found that the potential historical impact can be mitigated to a level of insignificance by committing to create a data recovery plan and interpretative display. (4 AR 958; 4 AR 1131; 4 AR 1133; 2 AR 540.)

Petitioners contend this mitigation measure is inadequate because it does not require the Bridge to be preserved (either by raising it or relocating it). In addition, Petitioners contend the EIR fails to analyze the potential safety impacts due to the possible elimination of an emergency access route.

The Court does not agree that a "data recovery plan" is not adequate mitigation. While the District may need to consider raising or relocating the bridge as part of a project-level EIR, if the bridge cannot be preserved, a data recovery plan would reduce the impact to a less than significant level

In contrast, the Court agrees with Petitioners that the District has impermissibly deferred analysis and mitigation of the potential safety impacts due to possible removal of emergency evacuation routes

Here, it is uncertain whether the Enlarge Pardee Reservoir component will be implemented, and if the component is implemented, whether the Middle Bar Bridge will need to be removed. In light of this uncertainty, it was permissible for the District to defer detailed analysis and mitigation of this issue to a future project EIR if and when the District decides to move forward with the Enlarge Pardee Reservoir component.¹¹ (6 AR 2806; 5 AR 2000, see also 10 AR 4243; 4 AR 1084.)

¹¹ Of course, if the District ultimately decides to move forward with the Enlarge Pardee Reservoir component, it will need to prepare a project-level EIR to fully analyze and mitigate any public safety impacts from moving or removing the Middle Bar Bridge

However, the District should have identified the potential safety impact due to possible elimination of emergency evacuation routes and adopted at least a general mitigation measure to mitigate such impacts.¹²

c. Biological Resources: Potential loss of instream, riparian, and upland habitat

Petitioners contend the District's EIR is deficient because it fails to adequately analyze the impacts on biological resources that would result if the river is inundated by expansion of the Pardee Reservoir.

The Court finds the discussion of possible biological impacts to be adequate for a first-tier, program EIR.

The EIR generally discusses the habitat conditions in the area of the Pardee Reservoir and the species that presently occupy this habitat. The EIR recognizes that implementation of the Enlarge Pardee Reservoir component could have a significant impact on the species or their habitat. However, because the specific configuration of the Pardee Reservoir component has yet to be determined, and implementation of the Pardee Reservoir expansion remains uncertain, the District properly concluded that it would not be feasible or practical to perform a detailed analysis of the particular biological impacts of the project. Instead, the EIR commits to fully examine such impacts in a project-level EIR when and if the District decides to move forward with the Enlarge Pardee Reservoir component.

The EIR includes enough information about the potential biological impacts of the Pardee Reservoir component for decisionmakers to intelligently consider the environmental consequences of adopting the project, which is the Water Supply Plan. The EIR does not include enough information to intelligently consider the environmental consequences of moving forward with the Enlarge Pardee Reservoir component, but the Water Supply Plan does not approve that component. Thus, under the circumstances, the Court finds the EIR's discussion of biological impacts to be adequate.

The Court also finds the District's adopted mitigation measures are adequate for a first-tier EIR.

Because it is uncertain whether the Enlarge Pardee Reservoir component will be implemented, and the specific configuration (elevation) for an expanded Pardee Reservoir has not been determined, deferring detailed analysis and formulation of specific mitigation measures was appropriate. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44

¹² The mitigation measure need not be specific. It would seem to be sufficient, for example, to commit to perform a study and take such mitigation measures as are recommended by it to preserve necessary emergency evacuation routes.

Cal.4th 459, 503 [tiering is properly used to defer analysis of environmental impacts and mitigation measures when the impacts or mitigation measures are specific to later phases].) It would have been premature for the District to attempt to analyze and mitigate site-specific impacts to biological resources based on speculation that the Pardee Reservoir will be expanded according to a particular configuration.

Where, as here, the agency is preparing a program-level EIR and devising specific mitigation measures is impractical, the agency can satisfy CEQA by making a firm commitment to future mitigation of significant impacts by devising measures that will satisfy articulated performance criteria. (*Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at pp.377, 381-382, *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 367; *Gentry v. City of Murrieta* (1995) 36 Cal App.4th 1359, 1394-1395.)

In this case, the District has committed to conduct habitat assessments and biological surveys prior to implementing any water supply component; to avoid critical habitat and sensitive species, where possible; or, if avoidance is not feasible, to consult with state and federal regulatory agencies to determine appropriate site-specific mitigation measures, such as replacement habitat or participation in an in-lieu fee program. (See 2 AR 525-533.) In general, this is sufficient to meet the requirements of CEQA for a first-tier EIR.

To support the District's finding that the adopted mitigation measures are sufficient to avoid or mitigate potentially significant biological impacts to a less than significant level, the District's mitigation measures should include a commitment by the District not to develop the Enlarge Pardee Reservoir component unless the potentially significant biological impacts are mitigated to a less than significant level. In the absence of such a commitment, it was premature for the District to find the potentially significant effects would be mitigated to less-than-significant levels.

However, the District remedied this problem by committing, as a condition of project approval, to prepare a project-specific EIR with mitigation for all potentially significant impacts before proceeding with the Enlarge Pardee Reservoir project. In so doing, the District has committed to future mitigation of all potentially significant impacts. With this commitment, the Court finds the District's adopted mitigation measures to be adequate for a first-tier EIR.

d. Other: Potential loss of eligibility for National Wild and Scenic River status and downstream impacts to Delta

Petitioners contend the District's EIR is deficient because it fails to adequately analyze the detrimental impact that flooding a stretch of the Mokelumne River could have on its eligibility for designation under the federal Wild and Scenic River Act.

The Court is not persuaded that the District's EIR was required to discuss the potential loss of consideration for "wild and scenic river" status as a potentially significant adverse environmental impact. No portion of the river currently is designated as part of the Wild and Scenic Rivers system. (5 AR 1995) The potential loss of this prospective environmental benefit is not, in this Court's view, equivalent to an adverse environmental impact.

In any event, the Court finds the EIR's discussion of this potential "impact" to be adequate. (See 5 AR 1995, 1998; 7 AR 3030.) The EIR indicates that the portion of the Mokelumne River between "Electra Afterbay" and the Highway 49 Bridge is suitable and eligible for possible inclusion in the national Wild and Scenic Rivers System. The EIR states that if the Pardee Reservoir is expanded, depending on the configuration, there is a possibility that this segment of the river could be inundated, but that the extent of that inundation and impacts cannot be determined unless and until the District develops a specific design proposal for this component. (7 AR 3030.) The Court agrees and therefore finds the EIR's discussion to be adequate for a program-level EIR.

Petitioners also allege the EIR is deficient because it fails to adequately analyze impacts that expansion of the Pardee Reservoir may have on the Delta. The Court does not agree.

The EIR acknowledges that there could be potentially significant long-term impacts to the lower Mokelumne River hydrology from construction of the Enlarged Pardee Reservoir. (See 4 AR 1039-1040; 2 AR 627-628.) The EIR finds, however, that implementation of Mitigation Measure 5.2A-11 would reduce these potential impacts to less-than-significant levels. This finding is supported by substantial evidence in the record.

The evidence in the record shows that Mokelumne River flows constitute less than 3% of the overall flow to the Delta. (5 AR 1998) While enlargement of the Pardee Reservoir could temporarily impact lower Mokelumne River flows, the disruptions to flows could be minimized through management of operations at Pardee Reservoir and Camanche Reservoir, which is downstream of Pardee (4 AR 1039-1040.)

The District's interference with Mokelumne River flows already are limited by its contract with the U.S. Bureau of Reclamation, FERC licenses, the terms of the District's water rights, and a Joint Settlement Agreement with the U.S. Fish and Wildlife Service and the California Department of Fish and Game. (5 AR 1998.) Any increase in capture above existing entitlements would be subject to legal and regulatory proceedings. (4 AR 1040.) The Water Supply Plan does not propose to increase the District's water rights or change its Joint Settlement Agreement water releases. (5 AR 1998.) Further, Mitigation Measure 5.2A-11 commits the District to modify and manage the future operations of the reservoirs to meet the

flow requirements established by the Joint Settlement Agreement and as needed to meet all environmental and downstream appropriator and riparian rights obligations. (4 AR 1040.)

Given the limited contribution of the Mokelumne River on the overall flow to the Delta, and the District's commitment to manage future operations of the reservoirs to maintain flow requirements established by the Joint Settlement Agreement and as necessary to meet environmental obligations, the Court finds that the District has adequately analyzed and mitigated the potentially significant impacts to the Delta.

2. The Enlarge Lower Bear Reservoir component.

Petitioners also allege that the EIR fails to identify potentially significant impacts from the proposed expansion of the Lower Bear Reservoir, including the growth-inducing impacts of the additional water supply, the elimination of existing recreational facilities, and the biological impacts from increasing cold water flows during the summer months.

The analysis regarding the biological impacts of the Enlarge Lower Bear Reservoir is essentially identical to the analysis regarding the biological impacts of the Enlarge Pardee Reservoir. As described above, the Court finds the EIR's discussion of potential biological impacts from the Enlarge Pardee Reservoir to be adequate for a first-tier, program EIR. For similar reasons, the Court finds the EIR's discussion of potential biological impacts from the Enlarge Lower Bear Reservoir also to be adequate for a first-tier, program EIR.

The Court finds the EIR also adequately identifies, for purposes of a first-tier EIR, the potentially significant impacts to recreational facilities. (4 AR 906.) The EIR acknowledges that enlarging Lower Bear Reservoir could have a potentially significant impact on recreation facilities and activities, but proposes to mitigate those impacts by relocating or replacing any recreational features displaced by enlargement of the reservoir. (4 AR 723, 793, 1077-1079.) This is adequate for a first-tier, program EIR.

The District also did not abuse its discretion in finding the potential growth-inducing impacts of the project to be less than significant. As the District notes in the EIR, the project is a solution to meet the District's dry-year water needs through 2040. The incremental increase in water storage created by the Enlarge Lower Bear Reservoir component would only be used to meet demand in dry years. Therefore, the potential growth-inducing impacts of the project are less than significant.

As for potential growth-inducing impacts outside the District's service area, the EIR states that while regional participation is desired, at this stage it cannot be determined if and to what extent other regional partners might participate. The

evidence supports the finding that regional participation in the project is too uncertain and speculative to require detailed environmental review at this time. (4 AR 793, 1207; 10 AR 4355.)

D. Did the District violate CEQA by failing to prepare an adequate analysis of reasonable alternatives to the project?

Petitioners complain that the District further violated CEQA by failing to prepare an adequate "alternatives analysis." First, Petitioners allege that the EIR's failure to identify significant impacts to the Mokelumne River and the Delta understated the potential impacts of the Regional Upcountry components, thereby skewing the EIR's alternatives analysis. Second, Petitioners allege the District improperly excluded the Los Vaqueros Reservoir project as a potentially feasible alternative. Third, Petitioners allege the District improperly rejected the Buckhorn Canyon Reservoir project as an infeasible alternative.

The Court agrees with Petitioners' first argument. The EIR failed to adequately identify potentially significant impacts due to the possible expansion of Pardee Reservoir. As a result, the District's Board was given an erroneous view of the potential environmental impacts for the Enlarged Pardee Reservoir component. This improperly skewed the EIR's alternatives analysis. (See *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431 [an analysis which understates the severity and significance of impacts impedes meaningful public discussion and skews the decisionmaker's perspective of the project's environmental consequences, alternatives, mitigation measures, and the appropriateness of project approval].)

Petitioners' second argument, concerning the Los Vaqueros Reservoir, involves three interrelated issues: (1) whether the EIR presented sufficient information to explain the decision to exclude the Los Vaqueros project from analysis in the EIR; (2) whether there is substantial evidence in the record to support the decision to exclude the Los Vaqueros project; and (3) whether the range of alternatives analyzed in the EIR is reasonable in the absence of the Los Vaqueros project. The Court considers each issue separately below.

The lead agency is responsible for selecting a range of project alternatives for examination. There is no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. (*Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.378.) Each case must be evaluated on its facts. (*Ibid.*) However, an EIR is required to ensure that all reasonable alternatives to a proposed project are thoroughly assessed by the responsible official. Therefore, an EIR must describe a range of reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 872.)

To be legally sufficient, the consideration of project alternatives in an EIR must permit informed decisionmaking and informed public participation. (Cal. Code Regs., tit. 14, § 15126.6(a); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1351.) Thus, the range of alternatives considered in an EIR must represent enough variation to permit a reasonable choice of alternatives so far as environmental aspects are concerned. (*Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.378.)

An EIR is required to include an in-depth discussion of those alternatives identified as at least "potentially feasible." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 569; *Preservation Action Council, supra*, 141 Cal.App.4th at p.1351.) But an EIR is not required to consider alternatives which are infeasible. (*Ibid.*) Thus, the lead agency must make an initial determination as to which alternatives are potentially feasible, meriting in-depth consideration, and which are not (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p.569.)

The Legislature has defined "feasible" for purposes of CEQA to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code § 21061.1; see also Cal. Code Regs., tit. 14, § 15364.) Among the factors that may be taken into account when assessing feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries, and whether the proponent reasonably can acquire, control, or otherwise have access to the alternative site. (Cal. Code Regs., tit. 14, § 15126.6(f)(1); *Citizens of Goleta Valley, supra*, 52 Cal.3d at pp 574-575.)

The EIR should publicly disclose its reasoning for selecting the alternatives considered in an EIR. The EIR should describe the rationale for selecting the alternatives to be discussed in the EIR. It also should identify any alternatives that were considered but rejected as infeasible during the scoping process, and briefly explain the reasons underlying that determination. (Cal. Code Regs., tit. 14, § 15126.6(c).) The evidence of infeasibility need not be found within the EIR itself, but any finding of infeasibility must be supported by substantial evidence in the record (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 569.)

In this case, the District stated in its Draft EIR that it considered but eliminated the Los Vaqueros Reservoir project due to "lack of definition of partners, benefits, and timeline for implementation." (4 AR 819, 11 AR 4413-4414.) In comments on the Draft EIR, the Contra Costa Water District (CCWD) argued the Draft EIR is not accurate. CCWD asserted the Los Vaqueros project is "sufficiently advanced" and defined to be evaluated in the EIR (See, e.g., 5 AR 1843, see also 7 AR 3051.) In response, the Final EIR stated that, "[g]iven the uncertainty about when and whether the [Los Vaqueros] project will be approved and whether it could provide specific benefits to EBMUD under mutually agreeable terms and conditions, the [project] has not been incorporated into EBMUD's

WSMP 2040 preferred portfolio." (5 AR 1845-1846.) However, the District indicated it would continue to track the project for future consideration (*Ibid.*; 11 AR 4413; see also 113 AR 42789-42792.)

The Court finds no violation of CEQA's informational mandate in regard to the Los Vaqueros Reservoir project. The EIR presented sufficient information to explain the reason for excluding that project, namely, the uncertainty regarding the cost, quantity, and reliability of future dry-year water supply that could be made available to the District by the project. (See, e.g, 5 AR 1845.)

However, as to the substantive decision to omit the Los Vaqueros Reservoir project, the Court agrees with Petitioners that the decision to exclude the project from consideration in the District's program EIR is not supported by substantial evidence in the record.

The District purportedly rejected the Los Vaqueros project due to lack of detail regarding implementation of the project. However, the same could be said for many, if not all, of the water supply components discussed in the EIR, including those in the Preferred Portfolio. Nearly all of the components involve regional partners and none of the regional partners have been confirmed. (4 AR 1207.) Moreover, most of the components have no defined benefits or timeline for implementation.

The Northern California Water Transfers component "assumes" the District will seek water transfers with partners who have supplies that originate in the north Delta, and indicates that new facilities "may be needed" to make water available for transfer. (4 AR 780-781.)

The Bayside Groundwater Project Phase 2 is based upon an existing successful storage project, but the EIR concedes that a "tangible project configuration for Phase 2" has not yet been determined. (4 AR 783.)

The Sacramento Basin Groundwater Banking/Exchange component is a "conceptual" project for which actual operational details are unknown. The EIR considered three conceptual "options" for implementing the project. (4 AR 786-787)

The Regional Desalination component is a project being "explored" which "could consist of one or more desalination facilities " (4 AR 788.) The proposed location for the project has not been determined, so the EIR "assumes" the East Contra Costa site will be selected and "presumes" the capacity of the completed project will be 71 MGD. (*Ibid*)

The Mokelumne Inter-Regional Conjunctive Use Project (IRCUP) / San Joaquin Groundwater Banking/Exchange component is a "conceptualized" project to use the foothill counties' Mokelumne River water rights as a source of water, the

District's Mokelumne River facilities as a conveyance mechanism, and San Joaquin County's groundwater basin for water storage. (4 AR 795.) The Draft EIR indicates that forum members are working to move the concept forward so that studies, agreements, etc. could be developed, "resulting in a more definitive project configuration." (*Ibid.*)

The configuration of the Enlarge Pardee Reservoir component is not determined. (10 AR 4237.) Neither is the operation scheme, which will "depend on the engineering design and the participants involved." (4 AR 793.) Further, while the majority of the land surrounding the existing reservoir is owned by the District, the District anticipates it will have to purchase or secure easements on additional lands needed for the project. (4 AR 790.) As the District itself vociferously has argued, it is uncertain whether the Enlarge Pardee Reservoir project will be approved and, if it is, what specific water supply benefits it will provide to the District.

The Enlarge Lower Bear Reservoir component is perhaps the best example since it is owned by PG&E, and PG&E expressly commented that it "cannot agree to the feasibility" of raising the Lower Bear Dam because it represents a "substantial modification" to a FERC-licensed project and "PG&E and EBMUD have not engaged in the substantive discussions required to fully understand the implications of this part of the WSMP 2040 proposal." (5 AR 1875; see also 4 AR 793 [noting the operation scheme has not been determined and would depend on the design of the dam and the participants involved].)

In short, all of the District's "preferred" water supply components are shrouded in as much, or more, uncertainty than the Los Vaqueros Reservoir project.

Because of the broad, programmatic nature of the District's Water Supply Plan, and the flexible and uncertain nature of the supplemental water supply components, the District was not required to include a detailed, site-specific analysis of the individual water supply components in its EIR.

However, for the same reason, the District cannot arbitrarily exclude potential water supply options merely because they are not fully defined and certain

The evidence in the record supports the assertion that the Los Vaqueros Reservoir project was sufficiently defined to be included as a "potentially feasible" alternative. The District abused its discretion in arbitrarily excluding the Los Vaqueros project for being "undefined" and "uncertain" while retaining other water supply components that are equally undefined and uncertain. The District's determination that the Los Vaqueros project is "infeasible" is not supported by substantial evidence in the administrative record as a whole. The District should have included the Los Vaqueros project as a potentially feasible alternative water supply component.

The Court now proceeds to consider whether exclusion of the Los Vaqueros project renders the EIR defective.

The range of project alternatives required to be analyzed in an EIR is judged against a "rule of reason." (*Rio Vista Farm Bureau, supra*, 5 Cal.App.4th at p.378.) An EIR need not consider every conceivable alternative to a proposed project. (*Ibid.*) CEQA merely requires enough variation to permit informed decisionmaking. (*Ibid.*) Thus, in assessing a claim that exclusion of a particular alternative renders the EIR defective, the question is whether the range of alternatives analyzed in the EIR is reasonable in the absence of the omitted alternative. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 992.)

The District contends that it considered a reasonable range of alternative portfolios to the project as a whole, and that it was not required to identify or evaluate a range of alternatives to the individual components of the project.

In general, the Court agrees that the District only was required to evaluate a reasonable range of alternatives to the proposed project, but the Court does not agree that it did so. While the Court has no objection to the conceptual range of portfolios described in the EIR, the Court finds there is insufficient variation in the composition of those portfolios to permit informed decisionmaking.

An EIR is required to ensure that all reasonable alternatives to a proposed project are thoroughly assessed by the responsible official. Therefore, an EIR must describe a range of reasonable alternatives to the project or to the location of the project, which could feasibly attain the basic objectives of the project and evaluate the comparative merits of the alternatives. (*Friends of the Eel River v Sonoma County Water Agency* (2003) 108 Cal App 4th 859, 872.) The discussion must focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives would impede to some degree the attainment of project objectives, or would be more costly. (*Ibid.*)

As described above, the project at issue is the District's Water Supply Plan. The purpose of the Plan is to identify and recommend solutions to meet the District's dry-year water supply needs through the year 2040. The Plan estimates dry-year water supply needs to the year 2040, and proposes and evaluates a range of "portfolios" to bridge the gap between supply and demand. Each portfolio consists of a series of "components" that could be implemented over time to meet the need for water in the District's service area. The components are comprised of water conservation, rationing, and recycling levels, and proposed supplemental water supply projects. (4 AR 688-689, 1669-1672.)

The Preferred Portfolio consists of the following components: 10% rationing¹³ (22 MGD [millions of gallons per day]), Level D conservation (39 MGD), Level 3 water recycling (11 MGD), and the following supplemental water supply components the Northern California Water Transfers, the Bayside Groundwater Project Phase 2, the Sacramento Basin Groundwater Banking-Exchange, Regional Desalination, Enlarge Pardee Reservoir, Enlarge Lower Bear Reservoir, and the IRCUP/San Joaquin Groundwater Banking-Exchange.

In addition to the required "no project" alternative, the EIR considered five alternative portfolios: Alternative Portfolios A, B, C, D, and E

Alternative Portfolio A is the "Groundwater/Conjunctive Use and Water Transfers" option. It emphasizes water production through groundwater/conjunctive use components and water transfers. Portfolio A differs from the Preferred Portfolio in that it requires less recycling (Level 2, or 5 MGD), and excludes the Enlarge Pardee Reservoir, Enlarge Lower Bear Reservoir, and Regional Desalination water supply components

Alternative Portfolio B is entitled the "Regional Partnerships" option. It emphasizes water production through regional partnerships. Portfolio B differs from the Preferred Portfolio in that it requires less conservation (Level C, or 37 MGD) and less recycling (Level 2, or 5 MGD), and excludes the Enlarge Pardee Reservoir and Bayside Groundwater Project Phase 2 water supply components.

Alternative Portfolio C is entitled the "Local System Reliance" option. It emphasizes water production through reliance on a new increment of water storage in the District's service area. Portfolio C differs from the Preferred Portfolio in that it includes more rationing (15%, or 32 MGD), less conservation (Level C, or 37 MGD), and less recycling (Level 2, or 5 MGD). It also differs in that it includes the Buckhorn Canyon Reservoir water supply component, and excludes all of the water supply components in the Preferred Portfolio

Alternative Portfolio D is entitled the "Lower Carbon Footprint" option. It emphasizes water production through projects and facilities having the lowest carbon footprint. Portfolio D differs from the Preferred Portfolio in that it includes more rationing (15%, or 32 MGD), less conservation (Level C, or 37 MGD), less recycling (Level 2, or 5 MGD), and excludes the Northern California Water Transfers, the Sacramento Basin Groundwater Banking-Exchange, Regional Desalination, Enlarge Lower Bear Reservoir, and IRCUP/San Joaquin Groundwater Banking-Exchange water supply components.

Alternative Portfolio E is entitled the "Recycled Water and Water Transfers" option. It emphasizes water production through recycled water and water transfers. Portfolio E differs from the Preferred Portfolio in that in that it includes

¹³ This was subsequently changed at the time of project approval to 15%

less conservation (Level C, or 37 MGD), and excludes the Regional Desalination, Enlarge Pardee Reservoir, Enlarge Lower Bear Reservoir, and the IRCUP/San Joaquin Groundwater Banking-Exchange water supply components.

In sum, the EIR considered the Preferred Portfolio, a "no-action" option, a "groundwater/conjunctive use and water transfers" option, a "regional partnership" option, a "local system" option, a "low carbon footprint" option, and a "recycled water and water transfers" option. The differences between the Preferred Portfolio and the alternative portfolios are summarized in the table below (with differences indicated in bold). (See 4 AR 798.)

	Pfd	A	B	C	D	E
Rationing	10%	10%	10%	15%	15%	10%
Conservation	Level D	Level D	Level C	Level C	Level C	Level C
Recycling	Level 3	Level 3	Level 2	Level 2	Level 2	Level 3
Nor Cal Water Trans	X	X	X			X
Bayside Groundwater Phase 2	X	X			X	X
Sac Basin Groundwater	X	X	X			X
Regional Desalination	X		X			
IRCUP	X	X	X			
Enlarge Pardee Res	X				X	
Enlarge Lower Bear Res	X		X			
Buckhorn Canyon Res				X		

At least two important observations can be made about this table.

First, while the EIR analyzed several different portfolios, each involving a different combination of components, the table shows that there is little variation between the components of the Preferred Portfolio and the components of the Alternative Portfolios. The EIR analyzed, in addition to the components of the Preferred Portfolio, just one alternative level of rationing (15%), one alternative level of conservation (Level C), one alternative level of recycling (Level 2), and one alternative supplemental water supply project (the Buckhorn Canyon Reservoir project).¹⁴

¹⁴ The Court does not mean to suggest that the District was required to identify and evaluate a range of alternatives for each individual component in the Preferred Portfolio. However, an EIR is required to evaluate a reasonable range of alternatives to the proposed project. When alternatives are simply reduced versions of the proposed project, there may not be sufficient

Second, the table shows that, at least in some cases, one component dominated and determined the overall portfolio. The most obvious – and relevant – example of this is Portfolio C, the "Local System Reliance" option. As described above, the purpose of this alternative is to emphasize water production through reliance on new water storage in the District's service area. (See 2 AR 558; 4 AR 694.) However, the only water supply component included in Portfolio C is the Buckhorn Canyon Reservoir project. (2 AR 558.) As a result, the "Local System Reliance" option is dominated and determined by the Buckhorn Canyon Reservoir component. (11 AR 4427.)

The question becomes, therefore, whether the Buckhorn Canyon Reservoir component is sufficient to allow a meaningful evaluation, analysis, and comparison of the "Local System Reliance" alternative. The Court concludes it is not.

Unlike any of the other supplemental surface water storage components, the Buckhorn Canyon Reservoir is the only one that involves constructing a new reservoir in a previously undeveloped area, rather than enlarging an existing reservoir. (4 AR 810, 1193, 1673.) Not surprisingly, the District subsequently determined the Buckhorn Canyon Reservoir project would have greater environmental impacts than the proposed reservoir expansions. (See 11 AR 4418.)

In addition, as the EIR notes, there is a long history, dating back to at least 1988, of strong opposition to the Buckhorn Canyon Reservoir project by community and environmental groups because of the expected environmental impacts to wetlands and biological resources. (2 AR 558; 10 AR 4378.)

For these reasons, the Buckhorn Canyon Reservoir likely never was a feasible water supply option. Not coincidentally, the District ultimately rejected the Buckhorn Canyon Reservoir project as "infeasible. (See 2 AR 558; 4 AR 1673; 10 AR 4362, 4378.) In so doing, the District also rejected the only local water storage alternative, in favor of the Preferred Portfolio and its Regional Upcountry components.

The District removed the Buckhorn Canyon Reservoir from further consideration because of its potential environmental impacts, the strong community opposition to the project, and the lack of potential regional partnering opportunities.¹⁵

variation between the alternatives and the proposed project to permit informed decisionmaking about whether to approve the project. In essence because an agency may approve part of the proposed project described in an EIR, an "alternative" consisting of parts of the proposed project may not be a true alternative. (See *Dusek v. Redevelopment Agency* (1985) 173 Cal App 3d 1029, 1043.)

¹⁵ The Court upholds the District's decision to reject the Buckhorn Canyon project as infeasible. This decision is supported by substantial evidence.

Against this background, the Court evaluates the District's decision to exclude the Los Vaqueros Reservoir project from consideration in the EIR. The Los Vaqueros Reservoir component, which was explored by the District as part of its 1993 Water Supply Plan, would involve expanding the capacity of the Los Vaqueros Reservoir, a local reservoir just outside the District's service area.

Unlike Buckhorn Canyon, the Los Vaqueros project does not involve a new reservoir in a previously undeveloped area, does not involve significant historical community opposition, and would allow the District to partner with other agencies to jointly resolve water supply issues. It also would avoid the potentially significant impacts to the Mokelumne River that may result from expansion of the Pardee and/or Lower Bear Reservoirs.

Under the circumstances, the Court is persuaded that there is not sufficient variation to permit a reasonable choice of alternatives in the absence of the Los Vaqueros Reservoir component. A meaningful evaluation and analysis of a "local" water storage alternative requires consideration of more than just the one, highly-controversial proposal for a new local reservoir in a previously undeveloped area. Accordingly, the Court concludes the EIR's alternatives analysis is deficient.

E Did the District violate CEQA by failing to respond to comments?

Finally, Petitioners assert that the EIR's responses to comments do not satisfy CEQA's information standards. The Court is not persuaded. Petitioners have failed to cite to any specific responses to comments that do not meet CEQA's information standards. Based on the Court's review of the record, the District's responses appear to be adequate from an informational standpoint. Thus, this claim is denied.

Disposition

For the reasons described above, the petition shall be granted in part and denied in part. The petition shall be granted in respect to the claims that (i) the EIR fails to adequately describe and mitigate the potentially significant impacts on cultural and recreational resources that would result if the Mokelumne River is inundated by expansion of the Pardee Reservoir; (ii) the EIR fails to adequately identify and mitigate the potentially significant safety impacts due to elimination of emergency evacuation routes; (iii) the EIR's alternatives analysis is deficient because it eliminated the Los Vaqueros Reservoir project and failed to consider a reasonable range of alternatives to the Regional Upcountry water supply components. In all other respects, the petition shall be denied.

A peremptory writ of mandate shall issue from this Court commanding Respondent District to set aside its certification of the EIR and all related project approvals based on the CEQA violations as set forth herein, and to prepare,

circulate, and certify a legally adequate EIR (consistent with views expressed in this ruling) before proceeding with the project. The peremptory writ shall further command District to file a return in this Court within six months after the issuance of the writ specifying what it has done to comply with the writ.

Petitioners are directed to prepare a formal judgment incorporating this ruling, and a peremptory writ of mandate consistent with the judgment; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312. Petitioners shall be entitled to recover their costs upon appropriate application.

Dated: April 11, 2011

Signed: _____

Hon. Timothy M. Frawley
Judge, Superior Court of California
County of Sacramento



CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing RULING by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: April 11, 2011

Superior Court of California, County of
Sacramento

By:



F. Temmerman
Deputy Clerk